PEMBINAAN SRI AMAN

v.

YONG POH KAH

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F 88/85]
26 DECEMBER 1986

CIVIL PROCEDURE: *Summary judgment under O. 14 - Appeal - Breach of contract - Liquidated damages - Whether any triable issues.*

The plaintiff, a building contractor, claimed the sum of RM37,297.10 being the balance sum due for work done and materials supplied in the construction and completion of the defendant's house. In an application for summary judgment under O. 14, the Senior Assistant Registrar allowed the application and the present proceeding was an appeal by the defendant against the Registrar's order.

Held:

[1] It appeared that when the plaintiff tendered for the work, it undertook to complete the house within 48 weeks from the date of possession of the site which was on 1 May 1983. Therefore the plaintiff had delayed for 80 days when it delivered the completed house on 14 April 1984.

[2] There is an issue as to the date of the commencement of the contract, and if the plaintiff had breached the contract for delaying 80 days in completing the house, the defendant would be entitled to claim liquidated damages under the contract for each day of delay at the agreed rate of RM200 per day.

[3] The alleged detective works, to which allegation the plaintiff has not responded, and the plaintiff's contention regarding the architect's final certificate, also become triable issues which can only be determined by oral evidence.

[Appeal allowed with costs. Defendant given leave to defend this action.]

Legislation referred to:
Rules of the High Court 1980, O. 14

For the defendant/appellant - Mazlinda Makhzan (Tong May Kuan with her); M/s. Ng Yook Woon, Andrew T.C. Saw & Co.
For the plaintiff/respondent - Abdul Rashid Karim; M/s. Yacob & Rakan-Rakan

JUDGMENT

Siti Norma Yaakob J:

In this suit, the plaintiff, a building contractor, claims the sum of RM37,297.10 being the balance sum due for work done and materials supplied in the construction and completion of the defendant's house. In an application for summary judgment under O. 14, the Senior Assistant Registrar allowed the application and the present proceeding before me was an appeal by the defendant against the Registrar's order.

I had allowed the appeal with costs as from the pleadings, I had found that there are triable issues raised namely

(1) the date of commencement of the contract,
(2) whether there had been a breach on the part of the plaintiff to complete the house within the stipulated 48 weeks,

(3) alleged defective works done in the completion of the house, and
(4) there was no final certificate of payment from the architect on the sum claimed.

All along the plaintiff had assumed that since it had already completed and delivered the house to the defendant, it is entitled to be paid for all works done and materials supplied. I am in complete agreement with this assumption provided of course the plaintiff had complied strictly with all its obligations under the contract. It is not disputed that it had to complete the house within 48 weeks from the commencement of the contract. Now, when did the contract commence? According to the plaintiff, it is to commence from the date of the contract, i.e. 3 October 1983, in which case, when it delivered the house to the defendant on 14 April 1984, it was well within the 48 weeks limitation period. The defendant, on the other hand, disputes this contention and maintains that the contract is to commence from the date of possession of the site which had been agreed and fixed as 1 May 1983, in which case, when the house was delivered on 14 April 1984, the plaintiff had been 80 days late for which he is entitled to liquidated damages under the contract calculated at the rate of RM200 per day unless an extension of time had been granted to the plaintiff by the architect. Since no such application was made or granted, the defendant maintains he is entitled to claim not only RM18,000 as liquidated damages for the 80 days delay but to set off this sum against the plaintiff's claim, if any. He has proceeded to claim this by way of a counterclaim to which no defence has been filed by the plaintiff.

A perusal of all documentary exhibits shows that in its letter dated 20 April, 1983, the plaintiff had submitted its quotation for the construction and completion of the house and had undertaken to complete the house within 48 weeks after the signing of the contract. The contract was signed on 3 October 1983, and from this, it would appear there was no delay on the part of the plaintiff when it delivered the completed house to the defendant on 14 April 1984. However, when the plaintiff tendered for the work, it undertook instead to complete the house within 48 weeks from the date of possesion of the site was on 1 May 1983. This would clearly show that the plaintiff had delayed for 80 days when it delivered the completed house on 14 April 1984. Two of the exhibited bills of quantities being progress payments nos. 2 and 3 are dated 30 August 1983 and 30 September 1983 respectively, implying that the plaintiff had taken possession of the site well before the contract was signed on 3 October 1983. This makes it reasonable to conclude that the completion date of 48 weeks should commence from the date of taking possession of the site on 1 May 1983. The plaintiff has not explained this apparent discrepancy and clearly there is an issue as to the date of the commencement of the contract. If that date should be 1 May 1983, the agreed date of possession of site then clearly the plaintiff had breached the contract for delaying 80 days in completing the house in which case, the defendant is entitled to claim liquidated damages under the contract for each day of delay at the agreed rate of RM200 per day.

The plaintiff has also responded to the allegation of defective works in the statement of defence and in the defendant's affidavit of reply and to that extent, the alleged defective works become triable issues which can only be determined by oral evidence. Likewise, the defendant elected to remain silent to the plaintiff's contention that under the contract, payment for the sum claimed is subject to the prior issue of the architect's final certificate which in this case, was never issued.

As there are triable issues raised in the pleadings which can only be determined by oral evidence, I had accordingly allowed the appeal with costs and given leave to the defendant to defend this action.

Also found at [1987] 2 CLJ 238